

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 MCALLEN DIVISION

4 LIZELLE GONZALEZ § CASE NO. 7:24-cv-00132  
5 VERSUS § MCALLEN, TX  
6 GOCHA ALLEN RAMIREZ, et al. § WEDNESDAY,  
§ JULY 24, 2024  
§ 1:00 p.m. TO 1:56 p.m.

7 MOTION HEARING

8 BEFORE THE HONORABLE DREW B. TIPTON  
9 UNITED STATES MAGISTRATE JUDGE

10 APPEARANCES:

11 FOR THE PARTIES: SEE NEXT PAGE

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1                   MCALLEN, TEXAS; WEDNESDAY, JULY 24, 2024; 1:00 P.M.

2                   CLERK: The Court calls Civil action 7:24-132,  
3 Gonzalez v. Ramirez, et al. May I have appearances by counsel?

4                   MS. GARZA: Good afternoon, Your Honor. Cecilia  
5 Garza, Lauren Johnson, and David Donatti for the Plaintiff.

6                   THE COURT: Okay.

7                   MR. NAVARRO: Good afternoon, Your Honor. Ricardo J.  
8 Navarro for the Starr County Defendants. And at my table are  
9 my two clients, District Attorney Mr. Ramirez, and Alexandria  
10 Barrera.

11                  THE COURT: All right. Okay. So, we are here for a  
12 couple of things. One is to figure out what we're doing for  
13 scheduling on the case. And I know that the parties had wanted  
14 argument on the motions. So, I guess it makes sense maybe to  
15 start with the motions. I've read them, obviously. How do you  
16 all want to proceed? Kind of what process?

17                  MR. NAVARRO: Well, I think the first -- the  
18 responsive motion that we had and of course our Rule 12 --

19                  THE COURT: Right.

20                  MR. NAVARRO: -- and assertion of immunity on behalf  
21 of the individuals.

22                  THE COURT: So, are you wanting to do argument and  
23 then just kind of go back and forth until we're done with that  
24 or --

25                  MS. GARZA: I think that makes sense. He can go

1 ahead and start with his motion and then we'll respond, Your  
2 Honor.

3 THE COURT: Okay. That's what I expected. Do you  
4 agree?

5 MR. NAVARRO: Yes.

6 THE COURT: All right. Go ahead.

7 MR. NAVARRO: If I may, Your Honor.

8 THE COURT: You bet.

9 MR. NAVARRO: So, when we were first retained in the  
10 case, I think that not all the Defendants had been served and  
11 we had communicated with opposing counsel and agreed to some  
12 waivers of service and agreed to the first amended complaint,  
13 which is the live complaint in the case. That's the complaint  
14 against which we filed our Rule 12 motion.

15 So, at this point we represent the two individuals  
16 who are from the prosecution office, the District Attorney's  
17 Office, Mr. Ramirez, and Ms. Barrera. That office, the case  
18 arises out of Starr County, Your Honor, but I would ask the  
19 Court to take judicial notice that this is a judicial district  
20 that covers three counties. So, Starr County is in it because  
21 the incident involved, and it happened in Starr County. But  
22 the judicial district in which Mr. Ramirez and Ms. Barrera  
23 worked is actually at the (indiscernible) County District --

24 THE COURT: You're talking about the state judicial  
25 district?

1 MR. NAVARRO: Yes, it's the state judicial district.

2 THE COURT: All right. I thought you were talking  
3 about the federal. Okay. Go ahead.

4 MR. NAVARRO: So, if -- Starr County is in it just  
5 because the incident happened in Starr County. But they  
6 actually exercised their judicial prosecutorial functions in  
7 two other counties as well.

8 We filed our Rule 12 motion to dismiss and then we  
9 also filed, and I confirmed with counsel, you know, we invoked  
10 this doctrine, this limited doctrine that allows some limited  
11 review or use of documents in the context of a Rule 12. That  
12 doctrine is in my view is a more recent vintage. It wasn't  
13 really in play when I first started doing 1983 work. But is  
14 now in play and can be used on limited circumstances to rebut  
15 (indiscernible).

16 The point of the Rule 12 is that -- and the documents  
17 that were submitted in support of it which we asked to be put  
18 under seal and which we ultimately agreed to be put under seal,  
19 was that the allegations contained in the complaint have a lot  
20 of conclusory jury arguments about the case involving a  
21 conspiracy between the sheriff's Office and the District  
22 Attorney's Office.

23 And there is -- the bald facts of the case are that  
24 the complaint, the criminal complaint that originally came --  
25 and this is pleaded in the first amended complaint, I don't

1 think I'm saying anything that's not in there -- originated in  
2 the hospital with Ms. Lizelle Gonzalez's own doctor. It was  
3 against the backdrop of the Texas Heartbeat Act, which was --  
4 had been passed just the year before. That's Senate Bill 8.  
5 We think that the existing documentation reveals that Ms.  
6 Lizelle's own doctor was quite confused about how that law  
7 worked and appears to have been the reason why there was a  
8 criminal case referral made to the local authorities.

9           The pleadings themselves say it was directed to the  
10 cities, police, as well as to the sheriff's Office. And the  
11 sheriff's Office did ultimately investigate the matter. That  
12 case was -- later when the investigation was complete, the  
13 court has in the sealed documents some of the more critical  
14 investigative documents that were generated by the  
15 investigators.

16           There was also a couple of grand jury subpoenas that  
17 were issued in order to get the medical records from the  
18 doctors and hospital.

19           MS. GARZA: Your Honor, if I may just -- I apologize,  
20 Mr. Navarro. But he is referencing some information that is in  
21 the sealed documents, and this is not a sealed or closed  
22 courtroom. So, we would just --

23           THE COURT: What did he reference that was -- that  
24 shouldn't -

25           MS. GARZA: He referenced the police department; he

1 also referenced information that is only in the sealed  
2 documents that's not in the pleadings and not in the public  
3 record. So, I would just to be careful about that, how we --

4 THE COURT: So, the fact that the police department  
5 was involved is not something that needs to be sealed. Right?  
6 Just information that will be in the reports. I didn't hear  
7 him talk about anything that was in the reports.

8 MS. GARZA: That's correct. But it's only found in  
9 the sealed documents.

10 THE COURT: What is?

11 MS. GARZA: The fact that it was reported to the  
12 police department.

13 THE COURT: All right. So, let's be careful about,  
14 you know, what we think that is in the sealed documents.

15 MR. NAVARRO: And I'm trying to -- and I'm going to  
16 limit my references to the description of the sealed documents  
17 that was part of the motion.

18 THE COURT: Okay. Okay.

19 MR. NAVARRO: But we think that the Court ought to  
20 take those into consideration in evaluating the Rule 12. And  
21 this is an area where I think that even the Plaintiff's own  
22 pleadings reveal that this was, in terms of Mr. Ramirez and Mr.  
23 Barrera, that they were reviewing this investigative file in  
24 their prosecutorial capacity. The file was actually presented  
25 by Ms. Barrera to the grand jury and the grand jury issued an

1 indictment. That's -- that did happen.

2 We can't really get into the specifics about what  
3 happened there because of the grand jury secrecy laws and we're  
4 somewhat constrained there. But it clearly was done and within  
5 their scope of their authority as judicial officers.

6 Mr. Ramirez was in fact himself not there at that  
7 time. Later on, after the indictment had been issued as  
8 pleaded there, and the defense attorney was -- came to visit  
9 him as pleaded, he -- it was brought to his attention that  
10 there was an additional section to the Code, 1906, that created  
11 an exemption to what otherwise appeared to qualify as a murder  
12 charge. And at that point Mr. Ramirez did dismiss the  
13 indictment.

14 That's really the case. At worst, at worst it's a  
15 failure to understand or to a negligence understanding that  
16 there was an additional exemption to that statute, the 1906.  
17 It's a question of not looking far enough down the statute to  
18 see that it was there and that it applied. If one reads just  
19 the beginning portions of it, the facts presented in the  
20 investigation do look here to present a proper charge. But it  
21 would have fallen to the DA's office to at that point look at  
22 that last section. And that's what was overlooked.

23 This is at best or at worst a negligence case. It's  
24 not a Section 1983 civil rights case. They're trying to make  
25 it into something much more than what it is. And we do think -



1 - we think that as far as the immunity protections available to  
2 judicial officers and to likely district attorneys, that those  
3 apply with equal force to the elected district attorney as they  
4 do to his assistant.

5 THE COURT: So, are you doing qualified immunity,  
6 absolute immunity, or both?

7 MR. NAVARRO: Both.

8 THE COURT: Okay.

9 MR. NAVARRO: We think the absolute immunity is to  
10 the extent that there's a judicial-- there's a prosecutorial  
11 decision in the presentation of the case to the grand jury, and  
12 then the qualified immunity on anything other than that would  
13 fall outside of that, which is very narrow. I think it's  
14 primarily an absolute immunity prosecutorial defense.

15 THE COURT: And I was calling it absolute. That's  
16 what I was referring to, prosecutorial.

17 MR. NAVARRO: And so, it's not exactly the same as  
18 the immunity of a judge, but it's pretty close. Because to the  
19 extent that the elected official, the district attorney, and  
20 his staff are working in the courts, it's a judicial function  
21 that they're exercising --

22 THE COURT: What about malicious prosecution?

23 MR. NAVARRO: I'm sorry?

24 THE COURT: What about a malicious prosecution  
25 charge?

1 MR. NAVARRO: Well, the malicious prosecution charge,  
2 I mean, you're going to have to show intent. And I mean, I  
3 think that at the pleading stage I will acknowledge to the  
4 Court candidly that that's a more difficult area. And that's  
5 why we invoked the -- this doctrine as we're looking at some of  
6 these investigations that were put under seal. Because I think  
7 the issue of the malicious prosecution, we've got to get the  
8 intent. I understand that's why it's pleaded the way it is.  
9 But --

10 THE COURT: So, how can you get into intent without  
11 allowing depositions on what was going through people's minds  
12 as opposed to just what the papers have to say?

13 MR. NAVARRO: Well, I mean, that's where I think we  
14 are going to need to decide, you know, how are we going to  
15 resolve that. Because it's not only -- the law is that on the  
16 assertion of immunity, whether it's qualified immunity or  
17 absolute immunity, the Defendant is also entitled to be free of  
18 the burdens of discovery.

19 THE COURT: Well, but there is limited discovery, for  
20 example on qualified immunity. You normally have a dual track.  
21 And what I'm trying to do is put this more like an excessive  
22 use of force from a police officer or somebody who is a prison  
23 guard. And so typically, what will happen is they get two  
24 bites at the apple at summary judgment, not a motion to  
25 dismiss.

1 MR. NAVARRO: Right.

2 THE COURT: And it's normally on 1983 grounds. You  
3 do some limited discovery that is dedicated to what -- the  
4 qualified immunity exclusively. And then once that's resolved,  
5 then we open it up to full discovery for the case to go  
6 forward. Is that not the proper process for this?

7 MR. NAVARRO: That would be -- if the Court  
8 determines that the issue of intent is sufficiently central to  
9 the case.

10 THE COURT: Well, I mean, the only reason I brought  
11 it up was you brought it up. You were saying that the only way  
12 to get there is with intent.

13 MR. NAVARRO: Well, on the malicious prosecution.

14 THE COURT: Right.

15 MR. NAVARRO: But they are still -- they are still in  
16 their judicial function as far as presentation of the case. So  
17 --

18 THE COURT: But even if they're in a judicial -- so -  
19 - and I guess that was my original question. Can a prosecutor  
20 still be sued under 1983 if -- for malicious prosecution if  
21 they're just doing their job, presenting stuff to a grand jury  
22 under certain circumstances?

23 MR. NAVARRO: And the case law says no.

24 THE COURT: Okay. Ever?

25 MR. NAVARRO: The case law that we have says that if

1 they're acting within the scope of their prosecutorial  
2 function, even improper or -- intent or malicious intent, does  
3 not penetrate the absolute immunity bar.

4 THE COURT: Okay. All right.

5 MR. NAVARRO: And we've cited those cases to the  
6 Court.

7 THE COURT: All right. Okay.

8 MR. NAVARRO: So, we would ask that as to the  
9 prosecutors, that the Rule 12 be granted. As to the sheriff  
10 Fuentes, that is a qualified immunity case, as we're not  
11 asserting absolute immunity as to Fuentes.

12 And with him, again, the pleadings are based on these  
13 allegations that there was some coordination of effort or  
14 conspiracy with the prosecutors, with the investigators. And  
15 the facts on that really are not going to bare out that there  
16 was -- he is the elected sheriff. This came over as a criminal  
17 complaint from the hospital. It was investigated as a criminal  
18 complaint by the sheriff's investigators. The sheriff himself  
19 was not involved in those investigative efforts.

20 The pleadings are that he coordinated and conspired  
21 with the prosecutors and that he did the same with his own  
22 staff. But there's no -- I don't know where they're getting  
23 those facts.

24 THE COURT: So again, at the 12(b) stage -- at the  
25 Rule 12 stage, the only way that you can establish that is by

1 submitting evidence.

2 MR. NAVARRO: Well, the sheriff -- I think with the  
3 sheriff, it may take that. It may take that. Or we may need  
4 more pleadings as to what exactly the sheriff -- the pleadings  
5 are fairly conclusory as to the sheriff.

6 THE COURT: But, I mean, they say what they say,  
7 which is you're supposed to take everything that's in the  
8 pleading as true. So are you making a distinction between the  
9 prosecutors and the sheriff as far as --

10 MR. NAVARRO: I am.

11 THE COURT: Okay, all right.

12 MR. NAVARRO: I am. I think the sheriff is in a  
13 different place than the prosecutors. Because the protections  
14 for the prosecutors are functional in terms of them acting  
15 within their prosecutorial office regardless of their intent,  
16 whereas with the sheriff, he does not have that. So, with the  
17 sheriff, he's more on a qualified immunity. And I think that's  
18 where the more blended approach on qualified immunity could  
19 come into play.

20 THE COURT: Okay.

21 MR. NAVARRO: So, the part where they deny the --  
22 that's why we filed a separate Rule 12 as to the sheriff. So,  
23 if the Court were to say, well, as to the sheriff, I think they  
24 get there, we would probably at that point answer for the  
25 sheriff and then come back with an MSJ-based qualified immunity

1 to flesh out that case. But the sheriff's case and the  
2 prosecutors' cases are two different sets of facts.

3 THE COURT: Okay. All right. Okay. Hear from the  
4 Plaintiffs?

5 MS. GARZA: Your Honor, with your permission, both  
6 Ms. Johnson and I will be addressing separate cases in with the  
7 Court.

8 THE COURT: Fine. Sure.

9 MS. JOHNSON: Good afternoon, Your Honor. Lauren  
10 Johnson and I will begin. May it please the Court.

11 Your Honor, in our justice system it is a violation  
12 of the highest order when those we entrust to uphold the law  
13 deliberately charge a person when they know that person did not  
14 commit a crime.

15 Lizelle Gonzalez' case is even more egregious than  
16 that. It's not a case where law enforcement simply ignored  
17 evidence that undermined probable cause, nor is it a case of  
18 mere negligence as alleged by defense counsel. This is a case  
19 in which Ms. Gonzalez has alleged that the sheriff and the  
20 district attorneys understood that Lizelle Gonzalez' conduct  
21 was not a crime under state law.

22 THE COURT: So, what evidence do you have of that?  
23 Because that's really what we get down to is that you're going  
24 to have to prove intent. So, how are you going to -- if they  
25 say we didn't know, we just missed that, how are you going to

1 disprove that?

2 MS. JOHNSON: Well, Your Honor, I think that there's  
3 a very basic expectation that law enforcement who are upholding  
4 and enforcing laws have an obligation to know what those laws  
5 are and what the limitations of them are. And here --

6 THE COURT: Well, I think people get charged all the  
7 time and they go oh, well, I thought that fit that statute, or  
8 I didn't think that exception applies. I think people get  
9 charged that way all the time. Maybe if they -- like I said,  
10 this is a really new law. If there is something that's further  
11 down in the statute they didn't read, this hasn't been applied  
12 very much, this is new, how is that not just them -- for  
13 example, like I said, it may have been negligence for them not  
14 to see it. But aren't you going to have to prove, well, we saw  
15 it and we chose to ignore it, and go after her anyway?

16 MS. JOHNSON: Your Honor, the statute is so clear  
17 that that is the only reasonable inference in this case. Here  
18 it's not an example of a newly passed law. And we point in our  
19 pleadings to how not only is the way the statute is written  
20 very clear that this statute, Section 19 does not apply --  
21 that's the entire homicide portion of the statute -- does not  
22 apply to the mother of the unborn child with regard to the  
23 death of that child. There are also cases where the Courts  
24 have looked at this question and found that the pregnant  
25 person, the pregnant woman could not be prosecuted, that there

1 was no crime where the allegation was based on the demise of  
2 the child at the expense or the cost of the actions of the  
3 mother.

4 So, this is something that is not new, has been very  
5 clear. And even where defense counsel points --

6 THE COURT: But the statute is new. You would agree  
7 the statute is new.

8 MS. GARZA: No, Your Honor.

9 MS. JOHNSON: No, Your Honor.

10 THE COURT: Well, I'm talking about this particular  
11 part. He was just talking about something just got passed.

12 MS. JOHNSON: No, Your Honor. And I can actually  
13 speak to that specifically.

14 THE COURT: Okay.

15 MS. JOHNSON: First of all, homicide statute itself  
16 and that exemption is not new.

17 THE COURT: I understand that.

18 MS. JOHNSON: But with regard to the Heartbeat Act,  
19 Your Honor --

20 THE COURT: Right.

21 MS. JOHNSON: -- I think that case -- that example is  
22 even more -- even more evidence of how the government knew that  
23 there was no criminal enforcement power.

24 First of all, SB-8, that only applied to civil  
25 enforcement. And the attorney general was very clear and the



1 language of the statute itself is very clear that it does not  
2 grant any authority by the government to criminally prosecute.  
3 And it also explicitly says that the civil statute, the civil  
4 penalties cannot even be enforced against the pregnant woman.

5 And so, in all instances Texas law has been and has  
6 continued to be clear the pregnant woman cannot be prosecuted  
7 in the way that these Defendants chose to do so.

8 And I would also note that the Court can consider  
9 whether or not this was a snap decision, a snap judgment was  
10 made very quickly without the opportunity to really deliberate  
11 and better inform the course of action. But here the Court has  
12 an entirely different picture. It has an investigation that  
13 took place over the course of not weeks, but months, and that  
14 after there was indictment, after there was even an  
15 investigation, there was an indictment, and then later an  
16 arrest.

17 This was a deliberative process at which time those  
18 actors had every opportunity to correct their behavior. But  
19 rather the fact that this time passed and that they continued  
20 with that goal, suggests that they were aware of it and were  
21 trying to build a case in spite of it. So that's --

22 THE COURT: Was there ever a time when the defense  
23 attorneys or the attorneys representing your client informed  
24 the prosecutors, hey, you can't even criminally charge them,  
25 and they chose to ignore that?

1 MS. JOHNSON: That is not something that we have  
2 pled, Your Honor, as far as --

3 THE COURT: Well, I don't care if you pled, I'm  
4 asking if that happened.

5 MS. GARZA: Actually, the information that we have,  
6 Your Honor, is that she did not have a criminal defense  
7 attorney until after she was arrested and shortly before  
8 dismissal, within a day.

9 THE COURT: Okay. So, when that happened, when was  
10 the first time that you think that the prosecutors at least  
11 were put on notice that they couldn't go after her criminally?

12 MS. JOHNSON: At the beginning of the case when they  
13 decided to investigate her.

14 THE COURT: And how did they know that?

15 MS. JOHNSON: Because they decided at the outset to  
16 call this a criminal homicide investigation.

17 THE COURT: No, I'm saying when did they find out --  
18 because at some point the charges were dismissed, right?

19 MS. JOHNSON: Yes, Your Honor.

20 THE COURT: At some point they figured out, oh, we  
21 can't proceed criminally. At what point -- as opposed to  
22 should have figured out, what point do we know that they were  
23 informed? For example, that's why I was asking about the  
24 defense attorneys. Did the defense attorneys or did somebody  
25 call them up and go you can't go after them criminally under

1 this statute, as opposed to you should have figured it out on  
2 your own. That's different.

3 MS. GARZA: Your Honor, I -- that's -- at this point  
4 without evidence, it's hard to say what --

5 THE COURT: But that's your client.

6 MS. GARZA: Excuse me?

7 THE COURT: That's your client. Your client would  
8 have made that phone call. Your client or their -- her  
9 representatives or some attorney --

10 MS. GARZA: Right. And we don't know what was  
11 discussed between our client's defense attorney and the  
12 district attorney. We do know that it's -- they -- at all  
13 times they knew what the statute said.

14 THE COURT: How do you know that? I mean, what if  
15 they just blew it? What if they just -- you know, I blow it  
16 every now and then. I go, oh, you know, my staff says, Judge,  
17 you completely forgot to do this. Happened today. I had to  
18 call some Defendants back in because I just blew it. I forgot  
19 something. Brought them back in, and I read the client their  
20 rights. I didn't do that intentionally. I just missed it.

21 MS. GARZA: I think that we can infer, Judge, on the  
22 fact that the investigation did take four months. This is  
23 Starr County, a small county where there are not a lot of  
24 murder indictments that come out of Starr County. So, this was  
25 a case that was investigated and looked at.

1           So, you're right, I can't say right now what they did  
2 or did not know or when they learned it. But it's -- you can  
3 infer that based on this type of murder indictment, the fact  
4 that there are so few murder indictments in Starr County, that  
5 this is knowledge that they had.

6           THE COURT: Do you agree that knowledge is required  
7 as opposed to reckless disregard?

8           MS. JOHNSON: No, Your Honor, we disagree. It can be  
9 that it's wanton disregard that is the basis. But here --

10          THE COURT: What's the difference between reckless  
11 disregard and wanton disregard? I don't know that I've heard  
12 that.

13          MS. JOHNSON: I maybe --

14          THE COURT: Okay. Well, I wasn't trying to get  
15 snarky. I've not heard wanton disregard. Okay.

16          MS. JOHNSON: Your Honor, I guess what I want to  
17 bring the Court back to or highlight is I think at this point  
18 the Court is asking questions that certainly could inform, but  
19 that Ms. Gonzalez has not yet had the benefit of discovery to  
20 fully probe. And at this point --

21          THE COURT: But you pled it. You pled that they  
22 knew.

23          MS. JOHNSON: Yes, Your Honor. And at this point,  
24 intent can be pled generally based on reasonable inferences,  
25 which are the nature of the investigation, the amount of time

1 that it took, and the level of coordination that it required  
2 over the course of four months as opposed to a snap judgment.

3 Also, given that this is the kind of case that was a  
4 -- it was a big deal to bring this kind of case. And  
5 certainly, the Court can also take into consideration that  
6 there's an expectation that when DAs are working together, when  
7 the district attorney is supervising his ADAs, that he would  
8 know the law and its limitations and that that would be --

9 THE COURT: But again -- so, I'm a federal judge. I  
10 don't know all federal law. I have to prepare for stuff. I  
11 had to prepare for this hearing. I don't just -- you can't  
12 just presume that I know all federal law. So, I don't think  
13 that you can assume that a DA knows all laws off the top of  
14 their heads.

15 MS. GARZA: Your Honor, it is also in our petition  
16 that DA Ramirez was sanctioned by the Texas Bar for knowingly  
17 going forward with a criminal prosecution that he should not  
18 have gone forward with. So that is pled in our petition, that  
19 there was -- there is at least some finding somewhere, that  
20 there is evidence out there that there was knowing -- that this  
21 was a knowing act.

22 THE COURT: What do you think about the difference  
23 between the prosecutors and the sheriff, and the qualified  
24 immunity versus the prosecutorial immunity?

25 MS. JOHNSON: Well, Your Honor, we agree with the

1 defense counsel that there is a different consideration with  
2 regard to prosecutors when they're acting within their quasi-  
3 judicial function and that the cases have lined out that  
4 distinction.

5           However, what -- where we disagree is that the  
6 actions of the DAs in this case fell within that function. And  
7 so, we've pled --

8           THE COURT: Fell within the function?

9           MS. JOHNSON: Yes, Your Honor.

10          THE COURT: Within the function of their  
11 prosecutorial --

12          MS. JOHNSON: We have argued -- we've pled that they  
13 were outside the scope of their prosecutorial function.

14          THE COURT: You said within.

15          MS. JOHNSON: I apologize, Your Honor.

16          THE COURT: Okay, all right.

17          MS. JOHNSON: And so, we are in agreement that there  
18 are certain kinds of actions that would be entitled to absolute  
19 immunity. But that's not the case here --

20          THE COURT: What are the allegations that are outside  
21 the judicial function or the prosecutorial function?

22          MS. JOHNSON: The allegations are that in advance,  
23 before there was an investigation of prosecution of Lizelle  
24 Gonzalez specifically, that there was an agreement between the  
25 hospital and the district attorney's office, and/or the

1 sheriff's office to gather information about these types of  
2 cases, these types of cases being women who were suspected have  
3 had abortions, for the purpose of criminal prosecution despite  
4 Texas Penal Code 19.06 clearly prohibiting that kind of  
5 prosecution against that kind of individual.

6 THE COURT: So, how do you know that? And who is it  
7 with, the sheriff or the prosecutors?

8 MS. JOHNSON: Your Honor, at this point we have pled,  
9 based on information and belief that there was an agreement  
10 that may have included both. We certainly have with regard to  
11 Lizelle -- Lizelle specifically pled that there was  
12 collaboration about her specific case based on information that  
13 was provided by the hospital.

14 THE COURT: But, I mean, you can say anything on  
15 information and belief. So, I am trying to figure out -- at  
16 some point your expectation is that there's evidence showing  
17 that, for example the DA or the DA's office knew, or they had  
18 this agreement.

19 MS. JOHNSON: (Indiscernible) --

20 THE COURT: But is that your suspicion or is -- what  
21 evidence do you expect is going to show?

22 MS. JOHNSON: Admittedly, Your Honor, we have not had  
23 the opportunity to have fulsome discovery or any discovery at  
24 this point. But we do expect that there will bear out that  
25 there were additional investigations with regard to other women

1 besides Lizelle Gonzalez for the purpose of criminal  
2 prosecution.

3 THE COURT: Okay. All right, go ahead. I'm sorry.

4 MS. JOHNSON: If the Court would just bear with me  
5 briefly.

6 THE COURT: Yeah. I threw you all over the place,  
7 didn't I? Sorry.

8 MS. JOHNSON: No, that's fine. That's fine. I want  
9 to address Your Honor's questions.

10 Your Honor, so as I said, this is a case where we  
11 don't agree that this is a case of negligence. We do believe  
12 that the case will ultimately bear out that there was an  
13 understanding of the limitations of the law and that the  
14 district attorneys and sheriffs acted in spite of it.

15 THE COURT: So, I'm going to ask you again. Because  
16 now that you set an understanding, that kind of gets into me  
17 back into the mind that -- are you going to have to prove that  
18 they knowingly did this, or do you think reckless disregard?  
19 Because that's not knowing. So those are different standards.  
20 What is the standard?

21 MS. JOHNSON: Your Honor, and I will look to the case  
22 exactly. But I believe that the law draws with regard to  
23 absolute immunity doctrine that it covers -- it doesn't cover  
24 intentional -- basically knowing violations --

25 THE COURT: Right.



1 MS. JOHNSON: -- but also violations that are so kind  
2 of glaringly obvious or reckless. And so, I don't want to  
3 misstate exactly the language. I can find that to give Your  
4 Honor.

5 THE COURT: So, you think it could be something other  
6 than knowing?

7 MS. JOHNSON: Yes.

8 THE COURT: In other words, so if they deny it and  
9 you say, well, it was so obvious you should have known?

10 MS. JOHNSON: Yes, Your Honor. And also, Your Honor,  
11 I think that what's most important about the discovery process  
12 is it will allow more information to inform the Court to make  
13 that assessment. But here, as the Court is taking the  
14 allegations as pled as true, we have shown that there was  
15 sufficient understanding at that -- of the law, and that Ms.  
16 Gonzalez is -- it not being applicable to her conduct.

17 THE COURT: Okay.

18 MS. JOHNSON: Your Honor, I would just note that  
19 obviously Ms. Gonzalez' prosecution and arrest had a hugely  
20 devastating impact in addition to her being publicly branded as  
21 a murderer. Her case received national attention. And her  
22 life and the life of her family has been severely impacted.

23 And so, Your Honor, we submit that the motions that  
24 the Court has before it from the Defendants are attempts to not  
25 be held to account. We ask the Court to deny the motions to

1 dismiss as not founded and at odds with existing precedent, and  
2 also as a request to extend absolute immunity and qualified  
3 immunity doctrine to extraordinary lengths to prohibit conduct.  
4 First --

5 THE COURT: Well, qualified immunity is easy. We do  
6 discovery on qualified immunity. What I'm trying to figure out  
7 is what to do with the prosecutorial immunity.

8 MS. JOHNSON: Well, with regard to the prosecutorial  
9 immunity, Your Honor, there are a number of cases that talk  
10 about what's outside the scope. And one of the lines of cases  
11 talks about investigatory functions, or the DA's involvement in  
12 investigatory functions. And what Ms. Gonzalez has pled is  
13 that the DAs were involved in an investigatory plan prior to  
14 Lizelle's specific case, and that in her specific case they  
15 were providing legal advice and directly involved in that  
16 process over the course of the four months for when Ms.  
17 Gonzalez first received care at the hospital to when she was  
18 ultimately indicted on March 30th. And so that -- I'm sorry --  
19 and arrested after that on April 4th.

20 And so, as the Court is aware, that kind of conduct  
21 where the DAs are acting more like the detectives or police  
22 officers than as advocates is not protected by absolute  
23 immunity.

24 Similarly, Buckley v. Fitzsimmons and its progeny  
25 talk about how when the DA is acting before probable cause or

1 without the existence of probable cause. That kind of action  
2 is not given the same kind of protections as absolute immunity.  
3 And in part it's because we don't have the same safeguards that  
4 a person has in the criminal system where the Court can look at  
5 the courtroom conduct of the DA, for example, or the  
6 presentation of evidence in the grand jury and make a decision  
7 as to whether or not that conduct was violative.

8 And so, where we had investigation action happening  
9 beforehand and the process of how to build a case for the grand  
10 jury happening with the collaboration of the DA and the  
11 sheriff, that is outside of the quasi-judicial function, and  
12 it's not entitled to absolute immunity.

13 THE COURT: Okay.

14 MS. JOHNSON: Additionally, Your Honor, I would just  
15 also raise -- Ms. Garza will speak specifically to the exhibits  
16 that the Court has raised. But I would ask the Court to really  
17 think about the implication that the Defendants are drawing  
18 here. They're asking the Court to hold against Ms. Gonzalez  
19 that she hasn't had discovery, that she has not -- that she  
20 does not have access to information that is uniquely in the  
21 possession of the Defendants and subject to heightened secrecy  
22 because of the investigative and grand jury process. And at  
23 the same time, they're submitting these documents that they  
24 claim support their arguments or their allegations without  
25 giving her the opportunity to probe it. And I -- and Ms. Garza

1 will speak more specifically to why the Court should not do  
2 that without first giving her the opportunity to inform the  
3 Court with discovery.

4 And finally, we'll speak -- I'll speak to the county  
5 liability claim, Your Honor. As the Court is aware, Ms.  
6 Gonzalez has also brought a claim against the county because  
7 the DA and the sheriff's office acted as final policymakers  
8 together and acted in violation of Texas law to further an  
9 unconstitutional policy of investigating women who had  
10 abortions with the goal of prosecuting them criminally.

11 So, we will ask Your Honor to reject these attempts  
12 by the Defendants to avoid liability and we ask that Your Honor  
13 give Ms. Gonzalez' claims the opportunity to have informed and  
14 reasoned consideration. And Ms. Garza will speak first with  
15 regard to the facts.

16 THE COURT: Okay.

17 MS. GARZA: Yes, Your Honor. Defendants rely heavily  
18 on sealed exhibits that were filed with the Court. However,  
19 the case law is very clear in that area and --

20 THE COURT: So, we keep talking about sealed  
21 exhibits. Let me just make sure I understand it. Is your  
22 objection to the fact that they were sealed or is your  
23 objection to me considering whether or not they're sealed or  
24 not?

25 MS. GARZA: The objection is considering them as part

1 of the 12(b)(6) motion.

2 THE COURT: Okay. So, the fact that they're sealed  
3 is not part of your complaint --

4 MS. GARZA: No. I'm just referring to them because  
5 that's how they're characterized within the record. Yes.

6 THE COURT: All right.

7 MS. GARZA: Yes. It has nothing to do with -- we  
8 agree that they should be sealed at this point.

9 THE COURT: Okay.

10 MS. GARZA: Your Honor, the case law is quite clear  
11 that you -- when determining a 12(b)(6) motion, you're limited  
12 to four corners of the pleading itself. There is a very rare  
13 exception when you can take into account other documents.  
14 However, that exception does not exist in this case. The  
15 exception is you can consider documents outside of the  
16 pleadings if they are specifically referred to in Plaintiff's  
17 original complaint. In this case, we are not.

18 Defendants are trying to make a stretch, saying  
19 because we are alleging that the DA and the sheriff were acting  
20 in coordination with regard to an investigation. And over and  
21 over again admittedly we say that there was an investigation.  
22 Obviously, the investigation is part of our claims. But  
23 they're making a leap to say that by us referencing an  
24 investigation, that we are specifically referring to specific  
25 documents within the investigation. That's clearly, that's

1 outside of the case law. Scanlan v. Texas A&M University  
2 specifically considered even when a report was mentioned within  
3 the complaint, the Fifth Circuit says no, you can't rely on  
4 bits and pieces of the report just because the report in its  
5 entirety was referred to in the complaint.

6           They -- there is no doubt, and I think that  
7 Defendants would have to concede that at no point in  
8 Plaintiff's amended complaint do we refer to any investigative  
9 reports, any grand jury subpoenas, anything that they have  
10 produced, and they are asking the Court to consider. I think  
11 everybody would agree, we did not specifically request those --  
12 refer to those documents.

13           In fact, Defendants concede that we were -- Plaintiff  
14 Gonzalez was not even aware of the documents or the contents of  
15 the documents until they were provided after they were filed  
16 under seal. So, there's no way that Plaintiffs could have been  
17 referring to documents that we didn't even know existed, Your  
18 Honor. So, I don't believe they meet that burden. And I think  
19 the case law is quite clear that those documents don't come in  
20 for your consideration under 12(b)(6) motion.

21           Normally, when that is -- the documents have to be  
22 central to the claim. And what the courts usually allow  
23 documents to come in is in the contract, sales agreement, a  
24 lease, something where the document itself is central to the  
25 claim that's being made. That's not the case here, Your Honor.

1           And if the Court does consider those initial  
2 documents, then this motion, pursuant to Rule 12, would be  
3 considered a Rule 56 motion at that point. Like the Court was  
4 alluding to earlier, it would be a motion for summary judgment.  
5 And that comes later in the proceeding, or at the very least  
6 would give Plaintiff the opportunity to conduct discovery and  
7 to offer evidence of our own.

8           In this particular case, they are cherry-picking  
9 certain documents that they feel, according to Defendants' own  
10 argument, rebut our allegations. This is not an evidentiary  
11 proceeding. This is just a simple hurdle. Did the Plaintiffs  
12 plead with sufficient factual allegation as to whether there is  
13 a claim that may go forward? This is not the evidence part of  
14 the proceeding, Your Honor. And so, this is -- it would be  
15 inappropriate for the judge to consider such documents at this  
16 time. So, we're asking that the documents be stricken, and the  
17 Court not consider these seven exhibits with regard to the  
18 12(b)(6) motion.

19           THE COURT: All right. Yes, sir. Do you have  
20 anything further? I'm not suggesting you should. I'm just  
21 looking --

22           MR. NAVARRO: Yeah, I do actually have some rebuttal,  
23 Your Honor, if I may.

24           THE COURT: Go ahead. Sure. I'll let both of you go  
25 back and forth.

1 MR. NAVARRO: So, under federal practice when lawyers  
2 plead a case, we are bound by Rule 11 in terms of having a  
3 factual basis to make the kinds of pleadings that we make.  
4 When we read these pleadings and there were allegations about  
5 these conspiracy and knowing and having agreements between the  
6 DA and the hospital, and we were looking at that, it just  
7 struck us that the pleadings, you know, reference information  
8 that was not apparent to us. We really wondered where that  
9 came from.

10 I talked to counsel. The reason I wanted them to  
11 have some documents in addition to the (indiscernible) this, I  
12 said I have some documents I would like to share with you. I  
13 would like to do it under a confidentiality order, which they  
14 agreed. And I would like to do it under seal because I think  
15 that -- I don't know where you're getting what you're getting.  
16 What I have doesn't match this. I would like for you to  
17 consider this and look at that and to see if it makes a  
18 difference. Because we think that they go against the kinds of  
19 allegations that you're making --

20 THE COURT: But does that mean I can't consider them?  
21 So, the point of a Rule 12 --

22 MR. NAVARRO: I think you can consider them, Your  
23 Honor.

24 THE COURT: Okay. When in a 12(b)(6) motion can I  
25 consider evidence that is not the complaint?



1 MR. NAVARRO: When the complaint makes actual  
2 allegations like this one does here at 4.3, saying that the  
3 hospital shared protected medical information. And then it  
4 jumps to --

5 THE COURT: I don't think that's right. I think that  
6 you think you have evidence that controverts that. But I think  
7 at the 12(b)(6) stage I have to take the pleadings that are in  
8 the complaint as pleaded as true even if you're going that's  
9 just flat wrong and I'm going to even get sanctions and money  
10 for this. But I don't think I can consider something that was  
11 not pled or attached to or referenced in the complaint.

12 You are doing what I think is basically what you  
13 would do after you've done some discovery, which is this is so  
14 wrong, I get to attach this. I don't think that that is a  
15 12(b)(6) exception. The I don't -- this is so wrong; I get to  
16 attach extraneous evidence; I don't think that exists. And I'm  
17 not doing that for any reason other than if I do that, I'll  
18 just get reversed and we'll be back here again if I consider  
19 things that I'm not permitted under the rules to consider.

20 Now, I thought that the rules were fairly clear. I  
21 have to take the statements of the complaint as true, and I  
22 can't consider any other documents that weren't either exhibits  
23 to the complaint or that weren't specifically referenced in the  
24 complaint. Do you think that there's a different rule?

25 MR. NAVARRO: I'm saying that there's evidence that

1 the allegations made in the complaint have no --

2 THE COURT: But that's a different -- but you  
3 answered a different question. I'm telling you that I think  
4 that the rule at 12(b)(6) -- and I'm not saying that I have an  
5 opinion one way or the other on the merits of the case. I'm  
6 talking about what am I allowed to look at at this stage. I  
7 think at a 12(b)(6) stage I can only look at what's in the  
8 complaint, what's attached to the complaint, and what is  
9 specifically referenced in the complaint. Do you think there  
10 is something that allows me to do more than that? If so, I  
11 need to see it.

12 MR. NAVARRO: Well, I think we've referenced what we  
13 think would apply, which is the limited case law that talks  
14 about what can be put before the Court in a Rule 12 to rebut  
15 some of the allegations made in the complaint.

16 THE COURT: And what is that other than the three  
17 things that I've just delineated?

18 MR. NAVARRO: Well, it would be the primary  
19 components of the investigative file that --

20 THE COURT: No, no, no. I'm saying why do you -- so  
21 were the primary components of the investigative file attached  
22 to the complaint?

23 MR. NAVARRO: The complaint has only the first  
24 amended complaint and it has no attachments.

25 THE COURT: Right. Were they attached -- okay. Were

1 they attached to any complaint?

2 MR. NAVARRO: They were not attached. There's no  
3 exhibits attached to any of the live complaints.

4 THE COURT: Right. I knew the answer to that, but I  
5 just want to make sure that I didn't miss it.

6 MR. NAVARRO: I know.

7 THE COURT: And so, were they referenced in the  
8 complaint?

9 MR. NAVARRO: They --

10 THE COURT: Was the investigative -- the components,  
11 primary components of the investigative file referenced in the  
12 complaint?

13 MR. NAVARRO: I mean, not directly, Your Honor.  
14 They're not referenced in that the -- I mean, this was why they  
15 were shared -- the content was shared with counsel. Okay?

16 THE COURT: Right. And I think that's just kind of  
17 pre-suit negotiations, or even post-suit. We're going, hey,  
18 this is going to end poorly for you, take a look at this. I  
19 used to do that when I was a defense lawyer. But I will say as  
20 a plaintiff's employment lawyer, I pled things -- you know, for  
21 example, that my client was discriminated against because of  
22 race. I may not have had a smoking gun at that point, but you  
23 know, you take what is in the complaint as true. The employer  
24 wouldn't then be able to respond to that saying on no, it  
25 wasn't because of that, it was because of all these other

1 reasons in response to a 12(b)(6). You can do that in a motion  
2 for summary judgment.

3 MR. NAVARRO: Yeah.

4 THE COURT: So that's why I'm trying to figure out if  
5 I can only consider what's specifically said in the complaint,  
6 what is attached to the complaint, and what is specifically  
7 referenced, documents that are not in the complaint but that  
8 are referenced by them, like the investigative files. That's  
9 what I'm trying to find out. Are those exhibits referenced in  
10 the complaint?

11 MR. NAVARRO: No, the complaint is very artful in  
12 terms of avoiding exactly doing any of that.

13 THE COURT: So, how can I consider --

14 MR. NAVARRO: So, because, you know, Your Honor, but  
15 the Rule 11 standards for pleadings mean something. Okay? I  
16 mean --

17 THE COURT: Well, no. So that's a different motion.  
18 That doesn't mean that you get around 12(b)(6) by attaching  
19 things that I can't consider at the 12(b)(6). That may be a  
20 motion for sanctions. And I get those, right? You've pled  
21 things that were not in good faith or that you as attorney  
22 didn't meet the Rule 11 standard. That's a different motion.  
23 That doesn't mean the sanction is I get to consider your  
24 evidence, right? Because again, that's just going to get me  
25 reversed. Right?

1 MR. NAVARRO: I think you're correct about that.

2 THE COURT: Okay. So, then my other question is, is  
3 there a way for prosecutors to be sued that -- outside of  
4 prosecutorial immunity? The knowing standard, right?

5 MR. NAVARRO: Yeah --

6 THE COURT: All right. And so, they say that they  
7 knew. Now, you may be able to disprove that, and you may be  
8 able to have -- you know, make some hay with that, and you may  
9 be able to file motions with that. But how can they -- how can  
10 you get that dismissed if I have to take what's in the  
11 complaint as true and I can't consider your exhibits because  
12 they weren't referenced without them being able to do some  
13 discovery on it?

14 MR. NAVARRO: Well, because of the prosecutorial  
15 immunity.

16 THE COURT: Okay. But we just said that there is a  
17 knowing exception to that, right.

18 MR. NAVARRO: Well, there's a knowing exception. But  
19 if they are within the scope of the prosecutorial function, it  
20 doesn't matter.

21 THE COURT: But it --

22 MR. NAVARRO: They can be malicious in their intent  
23 and still be entitled to absolute immunity.

24 THE COURT: Right. So, if they're in the grand jury  
25 room presenting it. But what about before that when they are

1 still in the investigative things?

2 MR. NAVARRO: Well, I guess that's where we get into  
3 that there is no investigative phase as pleaded --

4 THE COURT: Well, they allege that there was. I  
5 mean, it's --

6 MR. NAVARRO: Well, they say that they're going on  
7 information and belief.

8 THE COURT: But they pled it --

9 MR. NAVARRO: They're spinning it. They're -- you  
10 know.

11 THE COURT: And I get your frustration. I can sense  
12 that you feel like they're making stuff up in their complaint.  
13 I get that. But if the rules say I have to take their  
14 complaint at face value, no matter how badly you disagree with  
15 it, how can I ignore it? And if they say that they knew --  
16 like I said, there may be a different motion coming. If they  
17 pled that they knew and you put them on notice ahead of time,  
18 that may be a whole different motion hearing. But if I have to  
19 take their complaint at face value and they say that they knew,  
20 there is a knowing exception and/or at least the investigative  
21 -- they were alleging --

22 MR. NAVARRO: That would have to be outside of the  
23 scope.

24 THE COURT: Right.

25 MR. NAVARRO: They would have participated in the

1 investigative component of --

2 THE COURT: Which is what they -- they have alleged  
3 that. How can I ignore that?

4 MR. NAVARRO: I mean if the Court is -- it's a  
5 conclusory allegation. But if the Court feels like, okay,  
6 well, they say it's --

7 THE COURT: This is your opportunity to disabuse me  
8 if I'm wrong. And like I said, I'm not trying to get snarky  
9 with you now either just like I wasn't with her.

10 MR. NAVARRO: Yeah.

11 THE COURT: If the standard is if they put it in the  
12 complaint, I have to take it as true, then how can I get around  
13 that? Like I said, if you say, well, they knew it wasn't true,  
14 they shouldn't have put it in the complaint, that's a different  
15 motion. You understand what I'm saying.

16 MR. NAVARRO: Yes.

17 THE COURT: But if I have to take it as true, that's  
18 why I wanted to nail down what I can consider at the 12(b)(6)  
19 early stage.

20 So, if there are circumstances where a prosecutor  
21 could be -- have a 1983 claim against them, just like the  
22 sheriff could -- and we talked about the possible different  
23 standards for that.

24 MR. NAVARRO: Yes.

25 THE COURT: And I'm not saying how I would -- I

1 really don't know what the evidence is going to show. But at  
2 this phase, I just don't know how I can get around the fact  
3 that the complaint says what it says, I have to take it as  
4 true, and I can't consider your exhibits because they weren't  
5 referenced in the complaint.

6 MR. NAVARRO: Well, if the mere allegation of that  
7 there was a conspiracy outside of the prosecutorial function, I  
8 mean, is enough to defeat the Rule 12 on it. But I mean --

9 THE COURT: Like I said, you said that you've had  
10 communications with them that you think should have disabused  
11 them of that, that's a different motion. But we're not here on  
12 that motion. We're here on does the case get dismissed.

13 And so, to me if there are -- if the complaint would  
14 support an allegation that there was conduct by the prosecutors  
15 and the sheriff that would fall -- possibly fall outside of  
16 immunity, how can I not let them do discovery on that, at least  
17 on the bifurcated stage, the limited stage of addressing  
18 immunity first?

19 MR. NAVARRO: Well, they would be limited if there is  
20 -- what I'm seeing these days on that --

21 THE COURT: Right, yes.

22 MR. NAVARRO: -- the discovery is a very limited  
23 discovery on the issue of the immunity.

24 THE COURT: That's right. Correct.

25 MR. NAVARRO: And it's not a full-bore discovery on



1 everything.

2 THE COURT: Right.

3 MR. NAVARRO: It's a limited discovery option. And  
4 that seems to be the answer in some of these cases where --

5 THE COURT: So, it seems to me sometimes -- for  
6 example, the counties get sued. They say you know what, we're  
7 going to file a qualified immunity motion, but we don't want to  
8 go through the hassle of having the two stages, so we'll just  
9 do all at once. Because we want to take two depositions, one  
10 limited to immunity and one that's wide open. Sometimes they  
11 do that. But that's -- the Defendant has the right to limit  
12 discovery to just the immunity question. And so, we can do  
13 that in the bifurcated way. What I'm trying to do is, like I  
14 said, figure out how if prosecutorial immunity -- if the  
15 complaint is true, which I know you disagree with. But if the  
16 complaint is taken as true, how do you get around the fact that  
17 they should not at least get discovery on that?

18 MR. NAVARRO: Well, what kind of a discovery are we  
19 talking about?

20 THE COURT: Limited to immunity.

21 MR. NAVARRO: Are we talking about a written  
22 discovery, deposition discovery against the individuals? I  
23 mean, what are we talking about?

24 THE COURT: Well, I mean, I don't have to micromanage  
25 the case. We're professionals. And so, I try not to

1 micromanage the case. I really try to stay out of the cases.  
2 It's not my case, it's you all's case. It's your party's case.  
3 So, it seems like to me you've said that you've done Section  
4 1983 work. And I assume you've done the bifurcated discovery,  
5 right?

6 MR. NAVARRO: Yes, we've done it. I mean, inevitably  
7 you get into disagreements about the edges of --

8 THE COURT: I'm calling the judge. Yeah, sorry. No,  
9 I get that.

10 MR. NAVARRO: But yes, we've done that. And most of  
11 that stuff does get worked out. And I think that what we would  
12 want to know is what is the source of some of these  
13 allegations.

14 THE COURT: I understand.

15 MR. NAVARRO: You know? Like where are you getting  
16 this.

17 THE COURT: And I'm not commenting one way or the  
18 other. I'm not suggesting that you all have done anything  
19 sanctionable. I'm not suggesting that your clients have done  
20 what they're accused of. What I'm telling you is that at the  
21 12(b)(6) stage my options are very limited. And that is that I  
22 have to take the complaint as true, even though you don't like  
23 what it says, and I can't consider stuff that is outside of the  
24 complaint. And so, I just think that that's the standard.

25 So, what I would -- I think it makes sense for me to

1 deny the three motions to dismiss moot, the motion to strike  
2 the sealed exhibits as a result. All of them are without  
3 prejudice. Although I don't know that a motion to dismiss is  
4 going to be the proper vehicle. And then for the parties to  
5 confer about a discovery schedule that is limited to just  
6 immunity and have that limited discovery and then brief that.  
7 And then we'll stay the case pending our resolution of that.  
8 That is my proposal.

9 MR. NAVARRO: And we'll confer about that. If you're  
10 going to deny their motions, then that triggers our answer date  
11 I would imagine.

12 THE COURT: Well, I mean, nobody is going to default  
13 you. I mean, you have appeared. So --

14 MR. NAVARRO: Well, and but, we get -- we do -- we  
15 make admissions and denials in that answer. So, if we're going  
16 to do that, we might as well do that so that you have  
17 admissions and denials. Okay?

18 THE COURT: Sure. Yeah.

19 MR. NAVARRO: And that way I think it helps define  
20 the scope of the issues.

21 THE COURT: Right. Then you want your affirmative  
22 defenses and stuff like that.

23 MR. NAVARRO: One thorny issue here is of course how  
24 do you deal with Attorney Barrera's presentation to the grand  
25 jury. You know? I mean, I really am wrestling with exactly --

1 I mean, I myself don't even get into the details --

2 THE COURT: Let me just ask the Plaintiffs, how could  
3 that even remotely be a part of a case? That has got to be  
4 within prosecutorial immunity, doesn't it?

5 MS. GARZA: Yes, Your Honor. We would agree --

6 THE COURT: So, you're not going to ask anything  
7 about what happened in the grand jury room?

8 MS. GARZA: Absolutely not.

9 THE COURT: Because that's not going to happen.

10 MS. GARZA: That's correct, Judge.

11 THE COURT: Does that deal with your -- Ms. Barerra,  
12 I don't want (indiscernible) deal with any concerns that you  
13 all have that -- and I'm sorry, I shouldn't talk to Ms.  
14 Barrera. If you want to go visit with them, do you want to  
15 find out so we can nail down anything that you think might  
16 because a problematic --

17 MR. NAVARRO: As long as no adverse inferences can be  
18 drawn from that, we're not going to allow discovery about what  
19 happened in the grand jury room --

20 THE COURT: Well, I'm not going to draw any. And  
21 we're not at the jury phase as well. And I would definitely  
22 tell the jury, just like happens in criminal cases, you can't  
23 talk about what happens in grand jury. It's one of the most  
24 important secrecies that we have. So.

25 MR. NAVARRO: Exactly.

1 MS. GARZA: And we understand the distinction, Your  
2 Honor, between the prosecutorial function and the investigative  
3 function.

4 THE COURT: Right. So, do you all need to figure out  
5 when the prosecutorial function kicked in? Is there I guess  
6 case law on when that clock started?

7 MS. JOHNSON: We submit it's at the point of the  
8 grand jury presentation, Your Honor.

9 THE COURT: All right. So, if you disagree with that  
10 -- so that's on the record. You need to figure out when you  
11 think the prosecutorial function kicks in. I don't know the  
12 answer to that.

13 MR. NAVARRO: I didn't catch --

14 MS. JOHNSON: I'm sorry. At the point of the  
15 presentation to the grand jury. So, actions that -- with  
16 regard to --

17 THE COURT: So, a lot of times there's --

18 MR. NAVARRO: Okay, but there's allegations that says  
19 there's pre-agreements about how to deal with references from  
20 the hospital.

21 MS. JOHNSON: Right.

22 MR. NAVARRO: Okay. So --

23 MS. JOHNSON: Our position is that that is not a part  
24 of the quasi-judicial function.

25 THE COURT: All right. Well, you all can hash that

1 out. But that is something I think you need to hash out. And  
2 if you can't get that hashed out, then I can probably set that.  
3 And that will make the discovery process a lot more fluid -- I  
4 mean, efficient.

5 For example, I can tell you a grand jury indictment  
6 happens at Docket Entry Number 20 in a federal case. And there  
7 has been an information or a complaint, there's been all kinds  
8 of stuff that has happened weeks and months before that sure  
9 looks like a prosecutorial function. Because they're in there  
10 and they're charging. And so, I think you all need to put some  
11 thought as to when the prosecutorial function would kick off.  
12 And it's not the grand jury. It's before that.

13 MS. GARZA: Well, and Your Honor, and I think that  
14 it's also not necessarily a timeline, but there may have been  
15 some investigative functions that were occurring -- that's what  
16 the evidence will bear out. I mean, there may be some stuff  
17 that was done in furtherance of obtaining the indictment and  
18 the grand jury presentation. But if there was some like  
19 investigation by the DA's office of witnesses or conversations,  
20 that -- you know, so it's not really a need timeline, it's just  
21 the actions itself.

22 THE COURT: But like I said, the biggest fight that I  
23 see on this kind of first phase is figuring out when and where  
24 the prosecutorial function kicks in. If it is during the  
25 prosecutorial function, I'm not going to -- there's no

1 discovery because it doesn't make any sense. And I think  
2 everybody would agree.

3 MS. GARZA: Yes, Your Honor.

4 THE COURT: The sheriff I think is fairly  
5 straightforward. I mean, you often run on the sheriff --

6 MR. NAVARRO: The sheriff we can work out.

7 THE COURT: Yeah.

8 MR. NAVARRO: I think here the -- I mean from my --  
9 the prosecutorial function is when the casefile is referred to  
10 the DA for review.

11 THE COURT: Right. And so, really the time that I  
12 see these cases against prosecutors is when it's a malicious  
13 prosecution case. And you know, those are fairly few and far  
14 between and fairly specific. And you've got some smoking guns  
15 out there. It's not necessarily linked to, they just misread a  
16 statute or they -- I mean, if you've got evidence that say they  
17 saw that and they chose to ignore it, you know, maybe that's  
18 one thing. But if they should have seen it, you understand  
19 where some of the concerns, you're going to have to persuade me  
20 that that is going to be enough.

21 MS. GARZA: Understood.

22 MR. NAVARRO: So, if you want an agreed order from us  
23 on the scope of --

24 THE COURT: All right. No, not on the --

25 MR. NAVARRO: Scope of the discovery?

1 THE COURT: No. What I would like is an agreed  
2 schedule. So, you all get together, figure out what you want  
3 as far as -- you guys can send whatever discovery you want out,  
4 whether it's written depositions or whatever. I'm not going to  
5 micromanage that. You all figure that out. I'm -- the only  
6 thing I want from you is a timeline. Like, do you want --  
7 whatever it is, two months, three months for discovery. And  
8 then motions filed 30 days after that. You know, I'm just  
9 making numbers up. So, it's not uncommon to have three months  
10 of discovery, limited discovery to immunity. Then you've got  
11 the motion for summary judgment. They don't have any evidence  
12 of knowing or -- outside of the prosecutorial whatever.  
13 There's nothing about the sheriff. And they get to respond  
14 with whatever they think they have. I can resolve that.

15 If anything is still alive, then the case just goes  
16 forward with wide-open discovery with a new scheduling order.

17 MR. NAVARRO: With a new one, yeah.

18 THE COURT: Right. We do a completely new scheduling  
19 order and then it's wide open with whatever is left.

20 MS. GARZA: Your Honor, would you like us to kind of  
21 revise the case management plan and work from there?

22 THE COURT: I mean, you can --

23 MR. GARZA: Because we do have -- we kind of  
24 addressed this a little bit with Mr. Navarro's associate.

25 THE COURT: Well, I mean, so what you have here is



1 not particularly helpful.

2 MS. GARZA: No.

3 THE COURT: Because it says 90 days before trial. I  
4 haven't set trial.

5 MS. GARZA: Right. But we do have -- in the  
6 management plan itself -- not the scheduling order, but in the  
7 management plan itself, we do kind of have dates that run from  
8 a court's ruling. So, we can probably work off of that.

9 MR. NAVARRO: We'll file an amended one --

10 THE COURT: So, you don't have to do that. So,  
11 here's the way that these typically happen on the 1983 cases.  
12 You submit the I guess first phase scheduling order. It  
13 doesn't have a trial date. All it's got is discovery and  
14 motions cutoff. Okay? Then after I rule on that, the last  
15 line is going to be the parties should confer -- assuming that  
16 summary judgment wasn't granted, the parties should confer and  
17 give me a full scheduling order, or maybe we can have a status  
18 conference. That whatever is left, we get a full-blown  
19 scheduling order from.

20 That's why I was saying the 90 days before trial  
21 doesn't help very much, because that presupposes wide open  
22 discovery. So.

23 MS. GARZA: In all fairness, we really didn't know  
24 what to do with that.

25 THE COURT: That's okay. That's all right. I mean,

1 this was -- it's different.

2 So, the reason why I set these for these conferences  
3 is sometimes the defense doesn't want to do the bifurcated  
4 approach; they want to do just one global and let's get it over  
5 with. We'll file two phases of motions along the way. And if  
6 we need continuances because I haven't ruled because the two  
7 motions were filed too close together, then I just grant  
8 continuances. So.

9 MR. NAVARRO: I think -- I'm thinking through some of  
10 the logistical. So, obviously, there's things pleaded in here  
11 about knowledge and all that. I mean, I don't know who Ms.  
12 Gonzalez, the Plaintiff, is not going to know answers to those  
13 --

14 THE COURT: We're not going to sort that out here.  
15 Do your discovery.

16 MR. NAVARRO: Yeah. Yeah. Okay.

17 THE COURT: All right. So, like I said, everybody is  
18 on notice of what's at issue. You all try to work out when you  
19 think the prosecutorial function kicked in. If you think that  
20 there's some overlap, you all try to have that conversation  
21 ahead of time. Really try to get it to before you're in a  
22 deposition so that you don't waste your time and have to do  
23 multiple depositions or whatever. Try to figure it out. If you need  
24 that resolved ahead of time, then you all can involve me, or I  
25 can get a magistrate judge to handle it super quick. Okay?

1 MR. NAVARRO: Very well, Judge.

2 THE COURT: All right. So, for the record, Docket  
3 Entries No. 13, 16, and 23 are denied without prejudice. Those  
4 are the motions to dismiss, based on -- just the allegations  
5 that are in the complaint, which I am required to take as true.  
6 I believe that it makes sense for us to go forward on the  
7 bifurcated process to do immunity discovery only. The parties  
8 are going to confer and submit a proposed schedule for just the  
9 immunity portion and then they're going to confer about the  
10 scope of discovery. The motion -- Docket Entry 27, which is  
11 the motion to strike sealed exhibits is denied as moot. Okay?

12 MS. JOHNSON: Thank you, Your Honor.

13 MR. NAVARRO: Very good, Your Honor.

14 THE COURT: All right, thank you. Appreciate it.

15 (Hearing adjourned at 1:56 p.m.)

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I N D E X

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, court-approved transcriber,  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter.



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Date: August 27, 2024